

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN W. GEARY II and HILARY R. GEARY	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Articles 22 and 30 of the	:	
Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York	:	
for the Years 1975, 1976 and 1980.	:	

Petitioners, John W. Geary II, and Hilary R. Geary, 20 Broad Street, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Articles 22 and 30 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1975, 1976 and 1980 (File No. 801807).

On October 30, 1986, petitioners waived a hearing and agreed to submit the case for determination based upon documentation submitted and briefs to be submitted by December 30, 1987. After due consideration of the record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the principle of Federal conformity requires New York State to apply the mitigation provisions of Internal Revenue Code §§ 1311 through 1314.

II. Whether the State Tax Commission (now, the Commissioner of Taxation and Finance) was authorized by section 697(d) of the Tax Law to grant a refund of tax to petitioners.

FINDINGS OF FACT

Before submitting this case for determination, petitioners, John W. Geary II and Hilary R. Geary, and the Audit Division entered into a Stipulation of Facts. The stipulated facts are incorporated into and supplemented by the Findings of Fact.

1. Petitioners timely filed a New York State Combined Income Tax Return for 1974. On that return, petitioners deducted as an ordinary loss \$79,500.00, representing Mr. Geary's partnership share of a loss incurred on the sale of a stock exchange seat. The Audit Division disallowed petitioners' treatment of the \$79,500.00.

2. On November 27, 1981, the State Tax Commission ruled that the sale of a stock exchange seat constituted the sale of a capital asset; therefore, petitioners improperly deducted the loss from that sale as an ordinary loss rather than a capital loss. Petitioners were allowed a

capital loss for 1974 subject to certain limitation provisions provided for in Internal Revenue Code § 1211(b).¹

3. Petitioners also reported their 1974 loss as an ordinary loss for Federal purposes. The Internal Revenue Service did not disallow the deduction, and petitioners never amended their Federal returns.

4. On or about September 9, 1982, petitioners filed amended New York State and City income tax returns for taxable years 1975 and 1976, by which they claimed a refund of personal income tax for 1975 in the amount of \$15,417.33 and a refund of personal income tax for the year 1976 in the amount of \$6,517.76. The claims for refund were predicated upon petitioners' contention that they were entitled to carry over the 1974 capital loss to 1975 and 1976. Petitioners claimed a capital loss carryover in 1975 in the amount of \$49,906.00 and in 1976 in the amount of \$20,397.00.

5. By letter dated November 7, 1983, the Audit Division denied petitioners' refund claims for 1975 and 1976. The basis for the denial was a determination that the claims were not filed within the period of limitation set forth at Tax Law § 687. The Audit Division refused petitioners' request that it apply the "mitigation provisions" of the Internal Revenue Code of 1954, as amended, sections 1311 through 1314, which allow a refund in an otherwise expired year under certain circumstances.

6. On November 28, 1983, the Audit Division issued to petitioners a Notice of Disallowance of their 1975 and 1976 refund claims.

7. On or about January 13, 1984, petitioners filed an amended New York State and City income tax return for 1980 by which they claimed a refund of \$11,420.18. The refund claim was based upon a capital loss carryover from the year 1974 to the year 1980 in the amount of \$79,500.00.

8. On July 30, 1984, the Audit Division issued to petitioners a Notice of Disallowance of their 1980 refund claim.

CONCLUSIONS OF LAW

A. For the taxable year 1976, the New York City personal income tax was governed by Article 30 of the Tax Law which contained a provision requiring that local laws imposing a tax authorized by Article 30 be identical to the corresponding provisions of Article 22 (Tax Law § 1301[b]). The taxable year 1980 was governed by the Administrative Code of the City of New York, Title T. The provisions of Title T correspond to and are almost identical to the provisions of Article 22. This determination provides parallel citations to the Administrative Code. All statutory quotations are from Article 22.

B. Petitioners' refund claims for 1975 and 1976 were denied on the ground that they were not filed within the period of limitation for filing such a claim as provided for in Tax Law § 687(a).

¹Matter of John W. Geary II (State Tax Commission, November 27, 1981).

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid" (Tax Law § 687[a]; Administrative Code of City of New York § T46-187.0[a]).

It is undisputed that the refund claims were barred by the statute of limitations and that the application of the statute deprived petitioners of a benefit to which they might otherwise have been entitled. Petitioners argue that to avoid such an inequitable result, the Audit Division should have applied the "mitigation provisions" of Internal Revenue Code §§ 1311 through 1314. These provisions permit the bar to refund or assessment created by the Federal statute of limitations to be lifted in favor of the taxpayer or the Internal Revenue Service, respectively, in a number of special cases. Even assuming that those provisions would apply to the circumstances of petitioners' situation (and it is not at all certain that they would), they do not entitle the petitioners to the relief claimed here. The New York State Tax Law does not contain provisions similar to the Federal mitigation provisions; therefore, the Audit Division had no statutory authority to waive the New York statute of limitations on the grounds found in the Federal statute.

Contrary to petitioners' contention, the policy of conformity of New York State tax provisions to Federal tax provisions does not require, or even allow, the Audit Division to apply the mitigation provisions of the Internal Revenue Code. The conformity policy is embodied in several sections of the Tax Law and the Administrative Code including: Tax Law § 605 (Tax Law former § 604) and Administrative Code § T46-104.0, which govern accounting periods and methods; Tax Law § 607(a) and Administrative Code § T46-107.0(a) which govern the meaning of certain terms; and Tax Law § 612(a) and Administrative Code § T46-112.0(a) which are most relevant to the issues raised by petitioners. Tax Law § 612(a) provides, in pertinent part, "[t]he New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section." (See ___ Administrative Code § T46-112.0[a].) Petitioners argue that the application of Internal Revenue Code §§ 1311 through 1314 is necessary in order to conform their 1975 and 1976 New York adjusted gross income to their correct Federal adjusted gross income. In *Matter of Alaimo v. State Tax Commn.* (69 Misc 2d 484), the court held that a taxpayer was not entitled to use the income averaging provisions of the Internal Revenue Code to determine his New York adjusted gross income because those provisions did not alter or change the definition of Federal gross income or Federal adjusted gross income, but only established a pattern of taxing a portion of Federal adjusted gross income over a period of years. Similarly, the Federal mitigation provisions do not alter or change petitioners' Federal adjusted gross income as defined in the Internal Revenue Code. They merely provide a procedural remedy, permitting the recovery of an otherwise barred refund under very limited circumstances. Petitioners' attempt to distinguish *Alaimo* is unpersuasive.

The Court of Appeals decision in *Matter of Kreiss v. New York State Tax Commn.* (61 NY2d 916, revg 92 AD2d 1048) is also instructive. The petitioner in *Kreiss* reported a capital gain in 1974, resulting from the sale of his ownership interest in certain taxicab medallions. Litigation concerning that interest was resolved in 1977 with petitioner's agreement to pay \$19,000.00 to the plaintiff plus attorney's fees. The petitioner then filed amended 1974 Federal and State returns claiming a refund on the ground that his 1974 capital gain had been incorrectly reported and should be reduced to \$23,300.00. The Internal Revenue Service disallowed the amendment of adjusted gross income on the ground that petitioner's 1974 income had been correctly reported; however, it allowed a refund under the "claim of right" doctrine found in

Internal Revenue Code § 1341. The New York amendment was disallowed on the ground that petitioner's Federal adjusted gross income for 1974 was correctly reported as \$40,000.00. The refund was also disallowed on the ground that New York had no statute corresponding to the "claim of right" doctrine which would entitle petitioner to a refund under State law. The Court of Appeals upheld the State Tax Commission's position, holding that the refund petitioner obtained under the Federal statute did not mandate a refund under State law because the Federal statute was a procedural mechanism to recoup taxes with no State counterpart (cf. Matter of Hunt v. State Tax Commn., 65 NY2d 13, 19 [distinguishing Federal and State tax provisions directly relating to computation of income from those concerning ultimate tax liability such as the claim of right doctrine in Kreiss]). Likewise, petitioners' refund claims are barred by the State statute of limitations, and there is no provision in the State Tax Law which allows the bar to refund to be lifted.

B. After the Audit Division determined that petitioners' refund claims for 1975 and 1976 were barred by the statute of limitations, petitioners attempted to carry over their 1974 net capital loss to the next open year, 1980. Under the relevant provisions of the Internal Revenue Code and Treasury Regulations, petitioners were allowed to carry forward their 1974 net capital loss indefinitely to each succeeding taxable year until exhausted (IRC § 1212(b); Treas. Reg. § 1.1212-1[b]). Before carrying the 1974 loss forward to 1980, they were required to offset the loss against any capital gains realized in 1975, 1976, 1977, 1978 and 1979, successively (Lang v. Commissioner, 46 TCM 335, 342-343). Thus, the 1974 loss was completely absorbed by capital gains realized in 1975 and 1976. Petitioners have not even argued that they were entitled to carry over the 1974 capital loss to 1980 under Federal law. Rather, they argue that requiring them to conform their 1980 New York adjusted gross income to their 1980 Federal adjusted gross income would deprive them of a tax benefit to which they are entitled. As an equitable remedy, they argue they should be allowed the carryover for State purposes. Faced with similar arguments, New York's courts have upheld the State Tax Commission's policy of strict conformity (cf., Matter of Gurney v. Tully, 51 NY2d 818; Matter of Eveready Insurance Co. v. New York State Tax Commn., 129 AD2d 958).

C. Tax Law § 697(d) empowered the State Tax Commission (now, the Commissioner of Taxation and Finance) to refund any monies paid by a taxpayer under a mistake of fact, providing as follows:

"Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller." (See ___ Administrative Code § T46-197.0[d].)

Very clearly, petitioners' treatment of a loss from the sale of a seat on the stock exchange involved a question of law. The dispute was resolved by a decision of the State Tax Commission, and succeeding events, including petitioners' failure to timely amend their State and City personal income tax returns, likewise arose from their erroneous treatment of the 1974 loss. Since no moneys were paid by petitioners under a mistake of fact, they are not entitled to the relief provided by Tax Law § 697(d) and Administrative Code § T46-197.0(d).

D. The petition of John W. Geary II and Hilary R. Geary is denied, and the notices of disallowance issued on November 28, 1983 and July 30, 1984 are sustained.

DATED: Albany, New York
April 21, 1988

/s/

ADMINISTRATIVE LAW JUDGE